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SUPREME COURT, U.S.

No. 05-1591

IN THE

Supreme Court of the United States

BRANDI M. DEARTH,

Petitioner,

v.

RICHARD L. COLLINS and INFOPRO GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented a compelling reason to grant the Petition given that the question of whether an employer is entitled to the *Faragher-Ellerth* defense where the alleged harasser is a proxy for the employer was not presented or addressed in the proceedings below.

II. Whether Petitioner has presented a compelling reason to grant the Petition given that there is no evidence in the record supporting a claim that Richard Collins' job duties and level of control of the Company's operations were such that he should be deemed a proxy for InfoPro Group, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent InfoPro Group, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner Brandi Dearth ("Petitioner" or "Dearth") is a former employee of Respondent InfoPro Group, Inc. ("InfoPro"), a national medical transcription and health information management company based in Augusta, Georgia. (Pet. App. B at 11a-12a). InfoPro hired Petitioner on June 13, 2001 to serve as the Administrative Assistant to Respondent Richard L. Collins ("Collins"), InfoPro's Chief Executive Officer. (*Id.* at 12a). Her job responsibilities included the following: preparing correspondence and reports; setting up travel schedules and appointments; answering the telephone; meeting and greeting clients and visitors; and performing general clerical duties. (*Id.*) Upon the commencement of her employment with InfoPro, Petitioner received a copy of InfoPro's Employee Handbook (the "Handbook"). (*Id.*) The Handbook expressly stated that InfoPro employees were not to be rude, discourteous or uncivil, nor were they to treat others in an abusive, discriminatory or harassing matter. (*Id.*) The Handbook likewise contained a clear policy prohibiting sexual harassment and provided that employees who believed that they had been subject to harassment should immediately notify their supervisor or the Human Resources Department. (*Id.* at 12a-13a).

Almost immediately following the commencement of her employment with InfoPro, Collins became concerned with Petitioner's ability to perform her job duties effectively. (*Id.* at 13a). Specifically, Collins began receiving complaints from other employees that Petitioner exhibited extremely rude behavior towards them. (*Id.*) Although Collins spoke with Petitioner several times regarding her need to improve her attitude, her unprofessional behavior persisted, and in

February 2002, Collins decided he had no choice but to terminate Petitioner's employment. (*Id.*) After learning of Collins' decision to terminate her employment, Petitioner became extremely upset and begged Collins not to fire her. (*Id.*). At that point, Collins decided to give Petitioner yet another chance to improve her behavior. (*Id.*)

Unfortunately, Collins continued to receive complaints from InfoPro employees regarding Petitioner's rude and abusive behavior after February 2002. (*Id.* at 13a-14a). In this regard, not only was Petitioner verbally abusive to the husbands of two InfoPro employees, but she also caused another InfoPro employee to resign her position because she could no longer stand to work with Petitioner. (*Id.* at 14a). Unable to allow Petitioner's rude and discourteous behavior to continue to impact the InfoPro workforce negatively, Collins decided to terminate Petitioner's employment after discussing the issue with other members of InfoPro management, including Collins' wife, who served as InfoPro's Director of Operations. (*Id.*)

On the evening of November 8, 2002, Collins asked Petitioner to meet with him and InfoPro's Director of Marketing. (*Id.*) At the outset of that meeting, Collins explained that InfoPro was terminating Petitioner's employment and providing her with four weeks of severance pay. (*Id.*) In response, Petitioner accused Collins of sexual harassment. (*Id.*) It is undisputed that this was the first time Petitioner complained of alleged sexual harassment by Collins to anyone at InfoPro, including Collins himself. (*Id.* at 16a). Indeed, Petitioner admits that she did not file a charge with the Equal Employment Opportunity Commission ("EEOC") or lodge a complaint through the procedure specified in the Handbook at any point during her employment. (*Id.*)

Within a week of the termination of her employment, Petitioner filed a charge of discrimination with the EEOC. (*Id.* at 17a). After receiving a Right to Sue letter, Petitioner filed her Complaint in the United States District Court for the Southern District of Georgia (the "District Court") on December 16, 2003, alleging that InfoPro and Collins had taken certain actions against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and various state laws. (*Id.*)

Following the completion of discovery, InfoPro and Collins each moved for summary judgment on Petitioner's claims. (*Id.* at 11a). In an Order dated March 17, 2005, the Honorable Dudley H. Bowen granted InfoPro's and Collins' Motions for Summary Judgment, dismissing Petitioner's Title VII claims with prejudice and her pendent state law claims without prejudice. (*Id.* at 36a). In dismissing Petitioner's Title VII claims against Collins, Judge Bowen relied on the well-established principle that "[t]he relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." (*Id.* at 23a). Judge Bowen's analysis in dismissing Petitioner's Title VII sexual harassment claims against InfoPro was more complex. (*Id.* at 27a) First, after a thorough review of the record, Judge Bowen concluded that the conduct alleged by Petitioner, even if true, was not sufficiently severe or pervasive to give rise to a claim for sexual harassment under Title VII, emphasizing that there was no evidence that the alleged conduct interfered with or altered Petitioner's job duties. (*Id.* at 27a-32a). Second, Judge Bowen determined that even if the alleged conduct was severe and pervasive under the applicable standards, InfoPro was entitled to the protections of the *Faragher-Ellerth* defense as articulated in the cases of *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-65 (1998)

and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). (Pet. App. B at 32a-35a). This conclusion was based on the following facts: (1) InfoPro had a policy in place that addressed workplace harassment and specifically set forth a procedure for complaining about any such harassment, and (2) Petitioner unreasonably failed to avail herself of InfoPro's harassment policy by not notifying anyone in InfoPro management about the alleged harassment during her employment. (*Id.*)

Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"). (Pet. App. A at 1a). Specifically, Petitioner challenged the decision of the District Court on three grounds. First, she argued that the law permitted Collins to be held liable in his individual capacity under Title VII. (*Id.* at 2a-7a). Second, she argued that the alleged conduct by Collins, if true, was sufficiently severe and pervasive to give rise to a Title VII sexual harassment claim under applicable laws. (*Id.* at 8a). Third, Petitioner argued that InfoPro was not entitled to the *Faragher-Ellerth* defense because (1) a tangible employment action was taken against her, and (2) her failure to report the harassment was reasonable given that any attempt to do so allegedly would have been futile. (*Id.* at 8a-9a).

After careful consideration of the issues, the Eleventh Circuit affirmed the District Court's grant of summary judgment in favor of Collins and InfoPro. (Pet. App. A at 10a). In doing so, it agreed with the District Court that Collins could not be held individually liable under Title VII. (*Id.* at 7a). It also agreed with the District Court that InfoPro was entitled to the *Faragher-Ellerth* defense because "(1) InfoPro exercised reasonable care to prevent and promptly correct

any sexually harassing behavior, by virtue of its sexual harassment policy in its employee handbooks, and (2) [Petitioner] unreasonably failed to take advantage of any preventative or corrective opportunities provided by InfoPro, or to otherwise avoid harm, by failing to notify anyone at InfoPro of Collins' alleged harassment." (*Id.* at 8a-9a). Because Petitioner did not contend either on appeal or in the underlying District Court proceeding that the *Faragher-Ellerth* defense was unavailable to InfoPro because Collins was InfoPro's proxy, neither the District Court nor the Eleventh Circuit addressed that argument in rendering their respective opinions. (Pet. App. B at 32a-35a; Pet. App. A at 8a-9a). After her Petition for Rehearing was denied by the Eleventh Circuit, (Pet. App. C at 37a), Petitioner filed her Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. A Petition for Writ of Certiorari Should Not be Granted Absent Compelling Reasons.

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion . . . [and] will be granted only for compelling reasons." One example of such a compelling reason (and the compelling reason Petitioner erroneously claims to exist here) is a split among the Courts of Appeals on an "important matter." Sup. Ct. R. 10(a). As demonstrated below, however, because the Eleventh Circuit did not even address the issue that Petitioner brings to this Court, it cannot be said that the Eleventh Circuit's ruling on that issue created a split among the Courts of Appeals. Consequently, granting Petitioner's request for a writ of certiorari would not unify the nation's law on any important matter but would merely permit

Petitioner to, once again, seek relief that has been denied by two federal courts.

II. The Petition for Writ of Certiorari Should be Denied Because the Question Presented by Petitioner was not Raised in the Proceedings Below and Thus, the Eleventh Circuit's Decision did not Create a Circuit Split.

This Court has held that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (declining to review issue not presented below and stating that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The issue that Petitioner has asked this Court to review is whether an employer [is] entitled to the *Faragher-Ellerth* affirmative defense where the alleged harasser is shown to be a proxy for the employer. (Petition at *i*). Significantly, however, Petitioner never asked the Eleventh Circuit to address this issue. To the contrary, Petitioner's argument that InfoPro was not entitled to the *Faragher-Ellerth* defense was based solely on her contentions that (1) she suffered a tangible employment action, and (2) she was reasonable in her failure to employ InfoPro's internal policy. (Pet. App. A at 8a-9a). Never did she raise the issue of whether Collins, her alleged harasser, was a proxy for InfoPro, which is evidenced by the fact that the Opinion of the Eleventh Circuit made no mention of this issue. (*Id.*)

Similarly, Petitioner never argued to the District Court that the *Faragher-Ellerth* defense was unavailable to InfoPro because Collins was a proxy for InfoPro. Rather, Petitioner's argument that the *Faragher-Ellerth* defense should not apply was based solely on these four reasons: (1) she suffered a tangible employment action; (2) a jury, not a court, should determine the applicability of the *Faragher-Ellerth* defense; (3) InfoPro's adoption of a policy against sexual harassment did not constitute reasonable care to prevent harassment; and (4) Petitioner's failure to employ InfoPro's internal policy against sexual harassment was not unreasonable. Because Petitioner failed to raise the proxy issue before the District Court, it was not addressed in the Opinion of the District Court. (Pet. App. B at 32a-35a).

To reiterate, because Petitioner never raised the issue of whether a finding that Collins was a proxy for InfoPro would invalidate InfoPro's *Faragher-Ellerth* defense, neither the District Court nor the Eleventh Circuit ruled on that issue. (Pet. App. A at 8a-9a; Pet. App. B at 32a-35a). Therefore, Petitioner's claim that "a review is warranted to resolve a split among the Circuits" is incorrect. (Petition at 5). Essentially, Petitioner is making the nonsensical argument that the Eleventh Circuit deviated from other circuits with regard to an issue on which it did not rule. *See Dewey v. Des Moines*, 173 U.S. 193, 200 (1899) ("A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it.") Because the Eleventh Circuit's decision did not create a circuit split on the issue of whether the *Faragher-Ellerth* defense is available where the alleged harasser is shown to be the employer's proxy, it cannot be said that a compelling reason exists for this Court to review that issue as raised for the first time in the Petition.

III. Even if Petitioner had Raised the Question Presented in the Proceedings Below, the Petition for Writ of Certiorari Should be Denied Because Petitioner did not Present Sufficient Evidence that Richard Collins is a Proxy for InfoPro Group, Inc.

Even if Petitioner had raised the argument in the proceedings below that the *Faragher-Ellerth* defense was unavailable because Collins was allegedly a proxy for InfoPro, she could not have prevailed on such a claim because she provided no evidence to suggest that Collins was, in fact, a proxy for InfoPro. In her Petition, Petitioner appears to rely exclusively upon Collins' ownership of company stock, his title, and the alleged fact that he "was involved in directing and supervising the operations of the business." (Petition at 2). But at least one appellate court has stated that "[s]tock ownership is not a prerequisite for acting as a corporation's proxy," *Ackel v. Nat'l Commc'ns Inc.*, 339 F.3d 376, 384 (5th Cir. 2003), and another has held that having "an important title, 'Chief of Police,'" does not make a person the proxy for his employer. *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000). Rather, courts addressing the issue of whether an alleged harasser should be deemed the employer's proxy for purposes of determining the availability of the *Faragher-Ellerth* defense have looked to the scope of the alleged harasser's job duties and the level of control he exercised over the employer's operations. *See Ackel*, 339 F.3d at 384 (considering the unchallenged contention that the alleged harasser "was in charge of all aspects of the corporation's business"); *Johnson*, 218 F.3d at 730 (finding that the Chief of Police was not a proxy for his employer because he reported to numerous supervisors). Here, even if she had preserved the issue for appeal, Petitioner has not presented any competent evidence warranting a finding that Collins'

job duties and degree of control over InfoPro's operations were such that he should be deemed InfoPro's proxy for purposes of determining the availability of the *Faragher-Ellerth* defense. For this reason too, the Petition should be denied.

CONCLUSION

Petitioner never asked the District Court or the Eleventh Circuit to address the issue of whether Collins was a proxy for InfoPro and, if so, what affect such a finding would have on the availability of the *Faragher-Ellerth* defense. Consequently, neither lower court has given this Court a ruling on that issue to review. Further, even if this Court were inclined to examine an issue that was not raised and decided in the lower courts, Petitioner has failed to present any evidence regarding the scope of Collins' job duties and degree of control over InfoPro's operations that would permit the Court to conclude that Collins was a proxy for InfoPro. As such, Respondents respectfully submit the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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